IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 351 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

THAKORE CHATURJI MATHURJI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 351 of 1994
THROUGH JAIL for Petitioner No. 1
MR KR RAVAL for Petitioner No. 1
MR KG SHETH, APP for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 30/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

By filing this appeal under section 374(2) of the Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated January 31, 1994 rendered by the learned Additional Sessions Judge, Ahmedabad (Rural) at Mirzapur, in Sessions Case No. 100/92, by which he is convicted of the offence punishable under section 302 of the Indian Penal Code and punished with life imprisonment and fine of Rs.5000/- in default R.I. for two years.

2. Deceased Kadvaji Ranchhodji was a resident of village Madhavgadh, Taluka:Dehgam, District : Ahmedabad. He had an agricultural field in the sim of village Madhavgadh. The appellant is also a resident of village Madhavgadh and distantly related to the deceased. On March 18, 1992, the deceased had invited the appellant in his field for consuming liquor. While consuming liquor, the deceased had demanded a girl from the appellant, as a result of which an altercation had taken place between the deceased and the appellant. It is the case of the prosecution that the appellant had inflicted two dharia blows on the deceased and caused his death. In the morning, Sajanben who is daughter of the deceased, had informed Bhikhaji Amaraji that her father was lying dead in the field. Thereupon Bhikhaji in the company of Jashubhai had gone to the field of the deceased and found that the deceased had died. The complaint in the case was filed by Bhikhaji Amaraji with Mr. A.a.Khokhar, who was incharge of Dehgam Police Station. After usual investigation, the appellant was chargesheeted of the offence punishable under section 302 of the Indian Penal Code in the Court of learned J.M.F.C. Dehgam. As the offence punishable under section 302 I.P.C. is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Ahmedabad (Rural) at Mirzapur for trial, where it was numbered as Sessions Case No.100/92.

3. The charge at Exh.3 was framed against the appellant of the offence punishable under section 302 of I.P.C. The charge was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined; (i) Bhikhaji Amaraji,PW.1 Exh.6, (ii) Jashubhai Muljibhai,PW.2 Exh.7, (iii) Shivaji Gobarji, PW.3,Exh.8, (iv) Kalaji Koyaji, PW.4 Exh.9, (v) Ghamaji Laljibhai Patel, PW.5 Exh.10, (vi) Jayantibhai Ambalal Patel, PW.6 Exh.17, (vii) Dr. Khemchand Mavjibhai Chhatrapati, PW.7

Exh.20, and (viii) Mr. A.A.Khokhar, PW.8, Exh.22, to prove its case against the appellant. The prosecution also produced documentary evidence, such as, inquest panchnama at Exh.11, panchnama of place of occurrence at Exh.12, arrest panchnama of the appellant at Exh.16, discovery panchnama regarding dharia prepared under section 27 of the Indian Evidence Act at Exh.18, postmortem notes of the deceased at Exh.21, complaint of Bhikhaji Amaraji at Exh.23, report of Serologist at Exh.30 etc. in support of its case against the appellant. The appellant submitted his written statement at Exh.31 in support of his case that he was falsely involved in the case. Further one Parbatji Mathurji was examined by the appellant as defence witness no.1 at Exh.32. After recording of evidence of prosecution witnesses was over, the learned Addl.Sessions Judge explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by section 313 of the Code. In his further statement, the appellant claimed that the case of the prosecution against him was false.

4. On appreciation of evidence, the learned Judge held that it was proved beyond reasonable doubt that the deceased had died a homicidal death. The learned Judge noticed that no direct evidence relating to the incident in question was tendered before the Court by the prosecution and that the whole case against the appellant was based on circumstantial evidence. The learned Judge referred to the evidence of witness Jashubhai Muljibhai as well as that of Kalaji Koyaji and concluded that their evidence was cogent, convincing and trustworthy. After placing reliance on the evidence tendered by the above referred to two witnesses, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the appellant and the deceased were last seen together and that the appellant had 'danti' (dharia) with him. The learned Judge further held that it was proved by the evidence of witness Kalaji Koyaji that on the date of incident the deceased and the appellant had consumed liquor in the field of the deceased and that an altercation had taken place between them. The learned Judge referred to the medical evidence on record and concluded that it was proved by the prosecution that the injuries sustained by the deceased were possible by a weapon like 'danti' which the appellant had with him when he was last seen in the company of the appellant. The learned Judge also referred to the evidence of panch witness Jayantibhai Ambalal PW.6 Exh.17 and held that discovery of dharia pursuant to voluntary disclosure made

by the appellant was proved which was a circumstance against the appellant. The learned Judge noticed that after the incident, the appellant was not available in village Madhavgadh, but had gone to the house of his in-laws and this conduct of the appellant was not consistent with his innocence. The learned Judge took into consideration the cumulative effect of the above referred to circumstances and held that it was proved by the prosecution beyond reasonable doubt that in all probability, murder of the deceased was committed by the appellant and the appellant alone. In view of the above-referred to findings, the learned Judge has convicted the appellant of the offence punishable under section 302 I.P.C. and imposed punishment which is referred to earlier, by judgment dated January 31, 1994, which has given rise to the present appeal.

5. Mr. K.R.Raval,learned counsel for the appellant after taking us through the entire evidence on record, submitted that the prosecution has failed to establish the circumstances sought to be relied upon and, therefore, a reasonable benefit of doubt deserves to be given to the appellant. The learned counsel referred to the evidence of witness Jashubhai Muljibhai as well as that of Kalaji Koyaji and contended that their evidence does not clinchingly establish that the appellant and the deceased were last seen together, nor the said evidence establishes that the appellant had 'danti' with him and, therefore, the judgment impugned in the appeal deserves to be reversed. What was claimed by the learned counsel for the appellant was that the evidence regarding discovery of dharia pursuant to so-called voluntary disclosure made by the appellant is not trustworthy at all and, therefore, find of dharia should not have been relied upon by the learned Judge as a circumstance going against the appellant. The learned counsel pleaded that the prosecution has not established motive for commission of crime and as other circumstances which are established do not prove guilt of the appellant beyond reasonable doubt, the appeal should be allowed. In the alternative, the learned counsel for the appellant contended that the deceased had demanded a girl from the appellant after consuming liquor, as a result of which an altercation had taken place between the appellant and the deceased, and as there was grave and sudden provocation from the deceased to the appellant, the offence committed by the appellant would be punishable under section 304 Part-I of I.P.C. and not under section 302 I.P.C. The learned counsel pointed out that the appellant has undergone actual imprisonment of more than 9 years & 7 months and, therefore, after altering his conviction to one under

section 304 Part-I of I.P.C., he should be punished with imprisonment which he has already undergone.

6. Mr. K.G.Sheth, learned counsel for the State Government submitted that the evidence of witness Jashubhai Muljibhai and that of Kalaji Koyaji establishes beyond reasonable doubt that the appellant and the deceased were last seen together in company of each other and that at that time the appellant was armed with dharia. According to the learned A.P.P., the evidence of witness Kalaji Koyaji further proves that after consuming liquor an altercation had taken place between the appellant and the deceased and as medical evidence on record establishes that the deceased had sustained dharia injuries, the learned Judge did not commit any error in holding that the appellant was the author of injuries caused to the deceased. What was stressed by the learned counsel for the State Government was that pursuant to voluntary disclosure made by the appellant, dharia was discovered from the place pointed out by the appellant in presence of witness Jayantibhai Ambalal Patel, who is an independent witness and, therefore, discovery of dharia at the instance of the appellant is also a circumstance against the appellant. According to the learned counsel for the prosecution, the appellant was not available in his village soon after the occurrence, but had gone to the house of his in-laws and this conduct being relevant under section 8 of the Indian Evidence Act, should be taken into consideration by the Court while assessing the circumstantial evidence against the appellant. What was claimed by the learned counsel for the State Government was that the cumulative effect of the circumstances established by the prosecution is that in all human probability, the act of murder of the deceased was committed by the appellant and, therefore, the appeal should be dismissed. In answer to the alternative plea urged by the learned counsel for the appellant, the learned A.P.P. subitted that the appellant had caused fatal injuries on vital parts of the body of the deceased by a lethal weapon like dharia and, therefore, his conviction under section 302 I.P.C. which is recorded by the learned Judge should be upheld.

7. We have taken into consideration the submissions advanced at the Bar and reappreciated the whole evidence on record.

8. The fact that the deceased had died a homicidal death is not in dispute. This fact is amply proved by the prosecution through the evidence of Dr. Khemchand Chhatrapati, PW.7 Exh.20. Dr. Chhatrapati in his

evidence before the Court has stated that he had received the dead body of the deceased on March 19, 1992 and that he had conducted postmortem examination on the dead body of the deceased. The doctor has mentioned in his deposition before the Court that on examination,he had found two major wounds as well as two other contused lacerated wounds and that on internal examination, he had found cut scalp both occipital and left temporal bone. According to the doctor, the internal injuries were corresponding to external injuries and that external injuries no.1 & 2 were sufficient in the ordinary course of nature to cause death of the deceased. The injuries sustained by the deceased are also detailed in the inquest panchnama at Exh.11 which was prepared in presence of panch witness Ghamabhai Laljibhai Patel. It is not the case of the appellant that the injuries sustained by the deceased were either homicidal or accidental. Having regard to the facts of the case, we are of the opinion that the learned Judge was justified in holding that it was proved by the prosecution beyond reasonable doubt that the deceased had died a homicidal death. The said finding being eminently just, is hereby upheld.

9. Admittedly, the whole case against the appellant rests on circumstantial evidence. The prosecution has not claimed that the incident in question was witnessed by any one and no direct evidence relating to the incident is tendered before the Court. The law relating to circumstantial evidence is well settled. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind, may take place of proof. It is well settled that suspicion, however, strong cannot be allowed to take place of proof. Therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. It is not derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstance cannot fail. Therefore, many a times, it is aptly said that "men may tell lies, but circumstances do not". In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn, should, in the first instance, be fully establisehd and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis except the one to be proved. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent

with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, Court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is, or are not decisive. Where a case rests squarely on circumstantial evidence, the various sets of circumstantial evidence should be taken into consideration and their total effect should be such that they must lead unerringly to the guilt of the accused. Each fact must be proved individually and only thereafter the sum total of the proved facts has to be taken into consideration, but this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must prove each and every hypothesis suggested by the accused, however, extravagant and fanciful it might be. In Sharad v. State of Maharashtra, AIR 1984 S.C. 1622, after referring to earlier case-law, the Supreme Court has summarised the conditions to be fulfilled in a case based on circumstantial evidence as under :-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established;

(ii) the fact so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved;

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused; and,

(vi) where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court.

9.1 If the aforesaid various conditions are fulfilled, only then a Court can use a false explanation or a false defence as an additional link and not otherwise. As observed earlier, if the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way. It has to consider the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there shold be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural evidents, to human conduct and their relations to the facts of the particular case.

10. In the light of the above-referred to principles, we will now consider the question whether the case against the appellant is proved or not.

10.1 The first circumstance which is sought to be relied upon by the prosecution against the appellant is that on the date of incident, the appellant and the deceased were seen together and that at that time the appellant had a 'danti' with him. The evidence of witness Jashubhai Maljibhai PW.2 Exh.7 shows that he is a resident of village Madhavgadh and that on the date of incident he was going back to his house from his well in a tractor. According to this witness, on the way to his house he had seen the deceased and the appellant together and that the appellant had danti with him; whereas the deceased had a tin with him. Though this witness has been cross-examined at length by the defence, nothing could be brought on record so as to cast doubt about the version given by the witness in his examination-in-chief. It is relevant to notice that it is not established that the witness was on inimical terms with the appellant or that he had motive to implicate the appellant falsely in such a serious case. As there are no major flaws in the evidence of this witness, we are of the opinion that the learned Judge did not commit any error in placing

reliance on the evidence of witness Jashubhai. Further the evidence of witness Kalaji Koyaji PW.4 Exh.9 shows that he is a resident of village Madhavgadh and wa known to the appellant as well as the deceased. The witness has stated in his substantive evidence before the Court that on the date of incident he was diverting the course of water in his field (watering the crop) and that he had seen the deceased and the appellant sitting in the field of the deceased. According to this witness, he had gone to his field for the purpose of ascertaining as to whether any rabbit was caught in the net which he had spread, as rabbits were damaging standing crop. The witness has claimed before the Court that he had gone near the place where the appellant and the deceased were sitting and found that both of them were consuming liquor. What is claimed by the witness is that the deceased and the appellant were talking about a girl and that the deceased had asked the appellant to bring a girl whereupn the appellant had replied that it was not possible for him to bring a girl. The witness has also stated in his evidence that at about mid-night, light had gone off and, therefore, he had returned to his house. Though this witness is cross-examined at length, nothing could be elicited by the defence which would raise any reasonable doubt about the version given by the witness in his examination-in-chief. However, this witness in his cross-examination has admitted that the deceased was a head strong person and that quarrels had taken place between the deceased and people of the village. The witness in his cross-examination has also stated that on the date of the incident the deceased had consumed liquor in much quantity and that the deceased himself was operating a distillery and was consuming liquor. The discussion of the evidence tendered by the above-referred to two witnesses, in our opinion, establishes beyond reasonable doubt that on the date of the incident the appellant and the deceased were last seen together in the company of each other and that the appellant was armed with a dharia; whereas the deceased had a tin with him.

10.2 The second circumstance which is sought to be relied upon by the prosecution is that the deceased and the appellant had consumed liquor in the field of the deceased and that an altercation had taken place between two of them. In our view, the evidence of witness Kalaji Koyaji, which is cogent, consistent and trustworthy, establishes beyond pale of doubt that on the date of incident the appellant and the deceased had consumed liquor in the filed of the deceased and that a quarrel had taken place between them, as the deceased had

demanded a girl from the appellant. Thus, the second circumstance which is sought to be relied upon against the appellant is also satisfactorily established by the prosecution.

10.3 The third circumstance, which is relied upon by the prosecution to prove its case against the appellant is that the deceased had sustained injuries which were possible by means of dharia. The evidence of Dr. Khemchand Chhatrapati, PW.7 Exh.20 shows that the deceased had sustained four external injuries. The doctor in his examination-in-chief has clearly stated that the injuries sustained by the deceased were possible by muddamal dharia. The statement made by the medical officer that the injuries found on the dead body of the deceased were possible by muddamal dharia is not challenged on behalf of the appellant at all and, therefore, it is safe to rely upon the evidence of the medical officer. Thus, in our view, the prosecution has satisfactorily established that the injuries sustained by the deceased were possible by means of muddamal dharia.

10.4 Yet another circumstance sought to be relied upon by the prosecution is that pursuant to voluntary disclosure made by the appellant, muddamal dharia was discovered from the place pointed out by the appellant. In this regard, the evidence of panch witness Jayantibhai Ambalal P.W.6 Exh.17 is relevant. This witness in his deposition before the Court has stated that on March 19, 1992 he was called at Dehgam Police Station where the appellant was present and that in his presence the appellant had taken out dharia from his house. The discovery panchnama is on record of the case at Exh.18. It is relevant to notice that the evidence of Jayantibhai Ambalal shows that dharia which was discovered pursuant to voluntary disclosure made by the appellant was blood stained. The report of Serologist which is on record of the case at Exh.30 shows that traces of human blood were found on dharia, but the blood group could not be ascertained because the quantity of blood found on the dharia was not sufficient. In our view, therefore, find of blood stained dharia pursuant to voluntary disclosure made by the appellant is proved through the evidence of Jayantibhai Ambalal, which is corroborated by the contents of contemporary document on the record of the case viz. discovery panchnama produced at Exh.18 as well as by the evidence of investigating officer. Thus, the fourth circumstance which is sought to be relied upon by the prosecution against the appellant also stands satisfactorily proved.

11. The evidence of witness Jashubhai Muljibhai PW.2 Exh.7 also proves beyond reasonable doubt that after the incident the appellant was not available in village Madhavgadh and that he had gone to the house of his in-laws.

12. The discussion of the above evidence on record of the case proves the following circumstances against the appellant : (i) The appellant and the deceased were last seen together on the date of incident and that the appellant had a danti with him, (ii) The appellant and the deceased had consumed liquor in the field of the deceased and that an altercation had taken place between them, as the deceased had demanded a girl from the appellant, (iii) the injuries which were sustained by the deceased and which proved to be fatal, were possible by a weapon like muddamal dharia, (iv) the blood stained dharia was discovered from the house of the appellant pursuant to voluntary disclosure made by the appellant in presence of an independent witness, (v) After the incident, the appellant was not available in village Madhavgadh and that he had gone to the house of his in-laws.

13. We notice that the Supreme Court in the case of Vasa Chandra Shekhar v. Poona Satya Narayana (2000) 6 SCC 286, and (2) Geetha v. State of Karnataka (2000) 10 SCC 72, while explaining law, relating to circumstantial evidence, has ruled that where circumstances proved are put to the accused through his examination under section 313 of the Code of Criminal Procedure and the accused merely denies the same, then such denial would be an additional link in the chain of circumstances to bring home the charge against the accused. As indicated earlier, it is proved by cogent and reliable evidence that the appellant was last seen together in the company of the deceased with danti and that both of them had consumed liquor, but in the morning the deceased was found dead in his field. Therefore, if the death of the deceased occurs in suspicious circumstances, a reasonable explanation was expected from the appellant, as the deceased was last seen together alive in his company. Here in this case, the incriminating circumstances proved were put to the appellant and in his further statement recorded under section 313, he has merely denied the same. Therefore, such denial on the part of the appellant and non-explanation about the suspicious circumstances in which the deceased died will have to be treated as an additional link in the chain of circumstance to bring home the charge against the appellant. The cummulative effect of the circumstances

proved above clearly establishes that in all human probability,the act of commission of murder of the deceased was done by the appellant and the appellant alone. The circumstances proved establish guilt of the appellant beyond reasonable doubt. The conclusions drawn by us from the proved facts are consistent only with the guilt of the accused and, therefore, the decision rendered by the learned Judge holding that the appellant had caused death of the deceased being correct will have to be upheld.

14. The net result of the above discussion is that the prosecution has proved beyond reasonable doubt that the appellant had caused death of the deceased on March 18, 1992 in the field of the deceased.

15. This brings us to the question as to the nature of the offence committed by the appellant. The record of the case proves beyond reasonable doubt that the deceased was a heavy drunkard. The evidence of witness Kalaji Koyaji PW.4 Exh.9 establishes that the deceased was a head strong person and in fact, was running a small distillery. The evidence of witness Kalaji Koyaji further establishes that the deceased was in the habit of having illicit relations with girls of the village. In the light of these facts, the claim made by witness Kalaji Koyaji that the deceased after consuming liquor, had demanded a girl from the appellant and that on refusal by the appellant to procure a girl, an altercation had taken place between them has to be viewed. The evidence of witness Kalaji Koyaji,in our view, establishes beyond reasonable doubt that the appellant must have been deprived of power of self-control by grave and sudden provocation from the deceased. The record does not indicate that the appellant had sought provocation or that the provocation was given by the deceased in obedience to any law or in the lawful exercise of right. The evidence further indicates that the relations between the deceased and the appellant were cordial and, therefore, the deceased had invited the appellant to his field for consuming liquor. Having regard to the totality of the facts and circumstances of the case, it is difficult to attribute intention of causing death of the deceased to the appellant and, therefore, the conviction of the appellant under section 302 I.P.C. cannot be upheld. However, there is no manner of doubt that the appellant had done the act of causing injuries to the deceased which were likely to cause death of the deceased and, therefore, in our view, the offence committed by the appellant would be one punishable under Part-I of Section 304 of the Indian

Penal code. The record of the case shows that the appellant has undergone imprisonment of 9 years and 7 months and, therefore, we are of the opinion that punishment of imprisonment already undergone by the appellant would meet the end of justice in this case while convicting the appellant of the offence punishable under section 304 Part-I of I.P.C.

For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant under section 302 I.P.C. as well as sentence of life imprisonment and fine imposed on him are hereby set aside. Instead, the appellant is convicted of the offence punishable under section 304 Part-I of the Indian Penal Code. For commission of offence punishable under section 304 Part-I of the Indian Penal Code, the appellant is punished with imprisonment which he has already undergone. As the appellant has undergone the punishment imposed on him for the offence punishable under section 304 Part-I of I.P.C., the authorities are directed to release the appellant immediately, unless his presence is needed with reference to any other case. The appeal accordingly stands partly allowed.

The muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.)

(patel)